

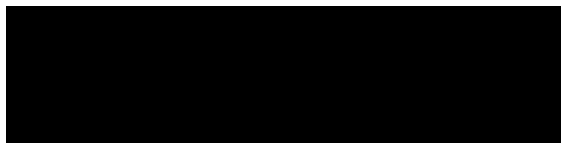
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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

MAR 29 2004

IN RE:

Petitioner:

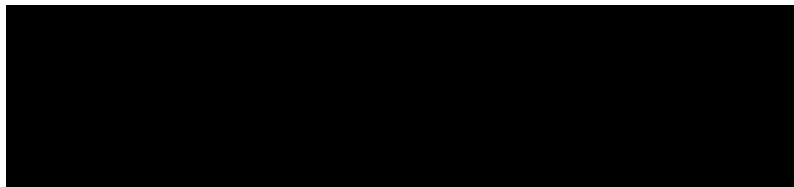
Beneficiary:



PETITION:

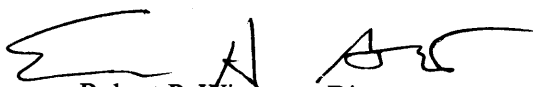
Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, California Service Center. Upon further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the petition, and his reasons therefore, and subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The director's revocation of the approved petition will be withdrawn and the petition will be approved.

The petitioner sought to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as an unskilled worker. The petitioner is a private householder who seeks to employ the beneficiary permanently in the United States as a live-out housekeeper. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The Immigrant Petition for Alien Worker (I-140) was originally approved on September 5, 1996. Following the receipt of information from both the beneficiary and the petitioner relevant to the beneficiary's application to adjust to permanent resident status, the director determined that the I-140 was approved in error and issued an intent to revoke the petition on October 13, 2002. The director concluded that the petitioner had failed to show her continuing ability to pay the beneficiary's proffered wage. The petitioner's response and submission of additional evidence failed to convince the director to revise his decision and the petition's approval was revoked on December 13, 2002, pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the director failed to properly evaluate the petitioner's other assets in support of her continuing ability to pay the proffered wage.

Section 205 of the Act, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) states in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is October 28, 1994. The beneficiary's salary as stated on the labor certification is \$8.00 per hour for a 40-hour week, or \$16,640 per year. The record indicates that the petitioner is employed as an accountant and files a joint federal income tax return with her spouse, claiming one dependent in all but two of the relevant years. The

information set forth on the approved labor certification and within the petitioner's federal tax returns reflects that the petitioner owns rental properties and will employ the beneficiary at one of these locations.

Relevant to the petitioner's ability to pay the proposed annual wage offer of \$16,640, copies of the petitioner's Form 1040, U.S. Individual Income Tax Return for the years 1994 through 2001 are provided in the record. They contain the following information:

Year	Business Income	Adjusted Gross Income
1994	\$23,034	\$51,904
1995	28,709	37,108
1996	25,234	13,367
1997	30,266	32,492
1998	43,357	56,788
1999	30,775	46,072
2000	40,134	39,581
2001	36,281	49,433

As the petitioner is a sole proprietor, her income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses generated by the sole proprietor and her dependents must be reviewed when determining her continuing ability to pay the beneficiary's proposed annual wage offer of \$16,640. She must be able to demonstrate that she can sustain her individual living expenses as well as pay the beneficiary's proposed salary. Here, the director requested the petitioner to provide a summary of living expenses for herself and her family. The petitioner's response reflects that her family's expenses were approximately \$2,500 per month in 2002. Although the director failed to specifically request living expense information for each of the pertinent years, this figure provides a sufficient indicator to analyze the petitioner's ability to pay the proposed salary of \$16,640 per annum.

To cover both the beneficiary's proposed annual wage of \$16,640 and the petitioner's annual living expenses of \$30,000, the petitioner needs to have approximately \$47,000 available to her. As set forth above, the petitioner's annual adjusted gross income was insufficient to cover this amount in 1995, 1996, 1997, 1999 and 2000. The deficit ranges from a high of approximately \$33,000 in 1996 to a low of about \$600 in 1999.

Following a review of the petitioner's financial data based on her adjusted gross income as set forth on the federal tax returns, the director concluded that the petitioner had not established her continuing ability to pay the proffered wage as of the priority date of the visa petition. The director also reasoned that the beneficiary's income tax returns for 1998, 1999 and 2000 showed that she had received far less than the proffered wage. It is unclear, however, from what source the beneficiary's income was derived as the record only contains the beneficiary's Wage and Tax Statement (W-2) for 2001, when she worked for the petitioner.

On appeal, counsel submits additional payroll and quarterly wage documentation showing that the beneficiary has been paid slightly more than the proffered wage since April 2001. Counsel argues that the director failed to credit the additional resources available to the petitioner as shown by the copies of various bank and financial accounts that had been submitted with the petitioner's response to the director's intent to revoke the petition. These accounts cover a period from 1994 through 2002. The individual and community/joint accounts, in excess of \$50,000 yearly, indicate that the petitioner had more than sufficient cash reserves available, if necessary, to cover the family's annual living expenses as well as the beneficiary's proposed yearly salary of \$16,640. As cash or cash equivalent assets, they represent appropriate additional resources to consider when a sole proprietor's ability to pay the proffered salary is determined. It is further noted that the pertinent regulations related to employment based immigrant visas require only that the employer intends to employ and is financially able to pay the wage set forth in the labor certification for the job described at the time that the alien is granted permanent resident status.

rather than having to show that he or she has actually paid the proffered wage at all times subsequent to the approval of the labor certification.

In view of the foregoing, the AAO concludes that the director revoked the approved visa petition without good and sufficient cause pursuant to section 205 of the Act.

ORDER: The director's decision to revoke the approved petition is withdrawn. The appeal is sustained.